

#2451

signed 1-26-99

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

NANCY MARIE SCHOLES,

DEBTOR.

NANCY MARIE SCHOLES,

PLAINTIFF,

v.

NEBRASKA STUDENT LOAN

PROGRAM, INC., and

ILLINOIS STUDENT ASSISTANCE

COMMISSION,

DEFENDANTS.

**CASE NO. 97-40608-7
CHAPTER 7**

ADV. NO. 98-7033

MEMORANDUM OF DECISION

This proceeding is before the Court following a bench trial. The debtor seeks to discharge student loans on the basis of undue hardship pursuant to 11 U.S.C.A. §523(a)(8). The debtor appears by counsel Robert Forer. Defendant Nebraska Student Loan Program, Inc. (“NSLP”), appears by counsel N. Larry Bork. Defendant Illinois Student Assistance Commission (“ISAC”) appears by counsel David J. Hershman. The Court has heard the evidence, reviewed the relevant materials, and is now ready to rule.

FACTS

The debtor is a 39-year-old, divorced mother of two children, ages 9 and 17, who lives in Pittsburg, Kansas. She works for United Parcel Service (“UPS”) about 25 hours per week and is paid \$11.25 an hour. UPS has her on call much of the time, making it difficult for her to work elsewhere,

but she does manage to work two to three hours a week at Dollar General Store, where she is paid \$5.25 an hour. Several months before the trial, she was injured at her UPS job. She has been receiving Workers' Compensation since that time, but will be able to return to work soon. Her earning capacity appears to be about \$16,000 per year until she can become a full-time UPS employee. Apparently, UPS retains a limited number of full-time employees and some number of long-term, part-time ones who routinely become full-time employees on a seniority basis when a full-time position opens up. While some part-time employees in the Pittsburg area have worked for UPS for as long as twelve years, the debtor has been with the company for less than three years. So, it may be a long time before the debtor can obtain a full-time position. Nevertheless, due to its higher hourly rate, her part-time UPS job pays her at least as much as her previous full-time job and has more future earnings potential.

Besides her wages, the debtor currently receives \$540 per month in child support. This amount will be reduced in July 1999 when her older child turns 18. Under the Child Support Guidelines adopted by the Kansas Supreme Court, it appears that the debtor should still receive about \$310 to \$330 per month for her remaining minor child. *See 1997 Kan. Ct. R. Annot. 89-137 (especially appendix II at 114-17)*. For each of the 1996 and 1997 tax years, the debtor also received a federal earned income tax credit of more than \$3,000. The Internal Revenue Service's 1998 forms indicate that an earned income credit of up to \$3,756 is available to a taxpayer who had two or more qualifying children living with her for more than one-half the tax year, but only up to \$2,271 is available to a taxpayer with one such child, and that a child under age 24 who is a student can be a qualifying child.

The debtor's older son hopes attend college on scholarship, continuing to live with the debtor, and would probably continue to be a qualifying child if he does so.

The debtor's expected monthly net income through July 1999 is \$1,230 in wages, \$540 in child support, and \$250 in earned income credit for a total of \$2,020. According to an updated Schedule J and her testimony at trial, the debtor's expenses are \$1,756 per month. In addition, she has been contributing \$139 per month to a 401k retirement account. After July 1999, her income should decrease by about \$210 to \$230 due to the child support reduction, and her expenses are expected to decrease by \$40. Her current schedule of expenses includes a monthly \$200 car payment that she no longer has to make. However, her car is a worn-out 1988 Pontiac with over 200,000 miles on it that she will need to replace sometime soon, so she will probably resume making car payments of around \$200 a month in the near future. The debtor's expenses are not excessive, but the earned income tax credit, not included on her income schedule, gives her flexibility not apparent in the income and expenses reported on the schedules. The debtor stated that one of her children needs psychiatric counseling for behavior problems that is not covered by her health insurance, and that she cannot afford its full cost of \$90 per week. She hopes to obtain help from a charitable organization that might reduce the cost to \$45 per week. She does not know how long this counseling need will last.

The debtor owes student loans totaling \$2,446.03 plus interest to NSLP, and \$1,236.97 plus interest to ISAC. She is expected to pay each creditor \$50 per month until the debts are paid.

DISCUSSION AND CONCLUSIONS

Section 523(a)(8) excepts the debtor's student loan debts from her discharge "unless— . . . excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor

and the debtor's dependents." The burden of proof is on the debtor to convince the Court as the trier of fact that payment of the student loans would impose an undue hardship—with emphasis on the word "undue"—on her. She must show that she would suffer more than that degree of hardship which generally causes debtors to seek the protection of the Bankruptcy Code, that is, a present inability to pay her debts. In addition, she must show that despite the relief afforded by the discharge of other debts, she will continue to suffer more than a future inconvenience or even some degree of hardship.

"Undue hardship" is not defined in the Bankruptcy Code or controlling case law, and this Court believes the question ultimately becomes whether the debtor will be able to repay her student loan debts in the foreseeable future without (1) being forced to seek state or federal welfare aid, or (2) ensuring that she will be a permanent member of the growing underclass in our society. The Court must determine whether it is reasonably or realistically possible that she can pay or service the loans in the foreseeable future. *See United States v. Brown (In re Brown)*, 19 B.R. 219, 222-24 (Bankr.D.Kan. 1982); *Turner v. Detroit and Northern Savings (In re Turner)*, 69 B.R. 62, 63-64 (Bankr.D.Minn. 1986). The purpose of §523(a)(8) is to prevent abuse of the Bankruptcy Code by individuals who, having financed their education, file petitions upon graduation and seek to discharge their student loans without making any good faith attempt to repay them, especially when the likelihood of their obtaining well-paying jobs has been enhanced by the education they received and they have little or no reason to file for bankruptcy other than the student loans. *See H.R.Rep. No. 595, 95th Cong., 1st Sess. 133 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6094; Report of the Commission on the Bankruptcy Laws on the United States, H.R.Doc. No. 137, 93d Cong., 1st Sess., Pt. II 140, n. 14 (1973).*

The Court finds the undue hardship question to be a close, difficult one in this case. After carefully considering all the circumstances, the Court concludes that it cannot say that the debtor is unable to repay her student loans. The total she owes is relatively small, and the payments she is required to make are also small. She might be able to consolidate her loans to reduce the required payments even further, and she might be able to obtain deferments to temporarily ease the repayment burden as well. The debtor currently has income that exceeds her expenses, although the excess comes from the earned income tax credit. Clearly, repaying the loans will not be easy for the debtor, especially if she pays for counseling for her troubled child. Counseling should not be a permanent expense, however, and without that expense, the debtor's income and expenses, as reported on her schedules and modified by her testimony at trial, show that she has the ability to repay her student loans over time.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

Dated at Topeka, Kansas, this ____ day of January, 1999.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE